Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPENDIX

Jurisdictional Statement Filed October 5, 1979

Probable Jurisdiction Noted November 26, 1979

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The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the Appendix to the Jurisdictional Statement:

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Chronological List of Important Dates

12- 5-73 Notice of Proposal to Issue Order Restricting Certain Uses of Electrical Energy issued by the Public Service Commission of the State of New York.

7-28-76 Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities Electric Promotion Practices issued by the Public Service Commission of the State of New York.

2-25-77 Statement of Policy on Advertising and Promotional Practices of Public Utilities issued by the Public Service Commission of the State of New York.

3-28-77 Petition of Central Hudson Gas & Electric Corporation for Rehearing of the Statement of Policy on Advertising and Promotional Practices of Public Utilities served.

7-14-77 Order of the Public Service Commission of the State of New York Denying Petitions for Rehearing issued.

11- 4-77 Notice of Petition, Verified Petition and Affidavit in Support of Petition served.

11-29-77 Verified Answer served.

12- 6-77 Reply to New Matter served.

2-17-78 Opinion of the New York Supreme Court, Albany County, issued.

3-14-78 Judgment of New York Supreme Court, Albany County, entered.

3-14-78 Notice of Appeal to the New York Supreme Court, Appellate Division, Third Judicial Department, served and filed.

3-22-78 Notice of Cross Appeal to the New York Supreme Court, Appellate Division, Third Judicial Department, served and filed.

7-27-78 Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, issued.

8- 2-78 Order of the New York Supreme Court, Appellate Division, Third Judicial Department, entered.

8-30-78 Notice of Appeal to the Court of Appeals of the State of New York served.

9- 1-78 Notice of Appeal to the Court of Appeals of the State of New York filed.

5- 1-79 Opinion of the Court of Appeals of the State of New York issued.

5- 1-79 Judgment and Order of the Court of Appeals of the State of New York entered.

5-30-79 Notice of Motion for Reargument served.

7- 9-79 Order of the Court of Appeals of the State of New York denying Motion for Reargument issued.

8-22-79 Notice of Appeal to the Supreme Court of the United States served and filed.

Affidavit in Support of Petition of Central Hudson Gas & Electric Corporation

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Index No. 11317-77

In the matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

for a judgment pursuant to Article 78
of the Civil Practice Law and Rules.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVISON W. GRANT, being duly sworn, deposes and states:

1. I am a member of the law firm of Gould & Wilkie, attorneys for Central Hudson Gas & Electric Corporation ("Central Hudson"). I am familiar with the matters set forth herein.

2. Since issuance of an order on December 5, 1973, Respondent, Public Service Commission of the State of New York ("Commission"), has had banned promotional advertising by electric utility corporations. A copy of such order is attached hereto as Exhibit 1. [Exhibit omitted in printing; printed previously in the Appendix to the Jurisdictional Statement (25a-31a).]

3. On July 28, 1976, the Commission issued a "Notice of Proposed Policy Statement and Request for Comments on Ad-

vertising by Public Utilities and Electric Promotion Practices" (herein "Initial Notice"). A copy of the Initial Notice is attached hereto as Exhibit 2. [Exhibit omitted in printing; printed previously in the Appendix to the Jurisdictional Statement (84a-87a).]

4. The Initial Notice indicated that the Commission was seeking comments on whether its ban on promotional advertising by electric utility corporations should be relaxed. As the Initial Notice stated on page 1:

> "On December 6[sic], 1973, at the height of the energy crisis precipitated by the exporting countries' boycott, the Commission flatly prohibited all sales promotional activities by electric companies. We are now considering relaxing that prohibition."

5. The Initial Notice also requested comments from interested parties with regard to possible changes in its policies and procedures relating to what it described as institutional and informational advertising of public utilities.

6. Pursuant to the Initial Notice, comments were to be submitted in writing to the Secretary of the Commission, not later than September 13, 1976.

7. On September 10, 1976, Central Hudson's Vice President —Community Affairs and Corporate Services submitted to the Secretary of the Commission a letter setting forth Petitioner's comments with respect to the matters for which comments were sought by the Initial Notice. A copy of such letter is attached hereto as Exhibit 3.

8. Such letter urged the Commission to reconsider its policy and ban on promotional advertising in light of a recent United States Supreme Court decision concerning regulation of commercial speech, *Virginia State Board of Pharmacy* v. *Citizens Consumer Council*, 425 U. S. 748, 48 L Ed 2d 346 (1976). Central Hudson also urged in such letter that the Commission consider a

non-restrictive, non-paternalistic approach to public utility advertising. As was stated in such letter on page 2:

> "We do ask that a strong and overriding emphasis be given to freedom of speech and that utilities be given every opportunity to operate outside of the present restrictive (by Commission admission) control of the Commission."

9. On February 25, 1977, the Commission issued "Order Implementing Certain Restrictions on Utility Advertising" and "Statement of Policy on Advertising and Promotional Practices of Public Utilities" (herein "Order" and "Policy Statement", respectively), copies of which are attached to the Petition herein as Exhibits A and B.

10. With respect to the proposed relaxation of the ban on promotional advertising by electric utility corporations, the Policy Statement indicated that no relaxation of that ban would be entertained. As was stated on page 5 of the Policy Statement:

> "We conclude that the existing ban on promotion of electricity sales should be continued. . . . Further, we shall continue to maintain surveillance of all advertising activities engaged in by electric utilities, and where deviations from the requirement of our order are found, we will take remedial action, including adjustments in rate cases, to bring about compliance."

11. The primary reason given by the Commission for its decision to continue its ban on promotional advertising by utilities was its fear that such advertising might cause consumers to waste energy or to cause them to believe that energy conservation was not necessary.

* * *

16. On March 28, 1977, Central Hudson filed with the Commission a petition for rehearing of the Order and Policy

Statement pursuant to Section 22 of the *Public Service Law*. A copy of such petition for rehearing is attached as Exhibit C to the Petition herein.

17. In its petition for rehearing Central Hudson urged the Commission to reconsider its continuation of the prohibition of promotional advertising, the prohibition of the insertion with bills sent to customers of materials presenting Central Hudson's position on matters of public controversy and the decision not to allow for ratemaking purposes the costs of advertising on matters of public debate. Central Hudson pointed out to the Commission that the Policy Statement and Order could be considered repressive and violative of principles of free speech embodied in the United States Constitution.

18. In its petition for rehearing Central Hudson called the Commission's attention to the fact that in *Virginia State Board of Pharmacy* v. *Citizens Consumer Council, supra,* the United States Supreme Court had held that a state agency cannot prohibit dissemination of truthful information solely on the basis that the agency fears that such information will induce consumer behavior which the agency considers not desirable. For this reason, Central Hudson submitted, the Commission could not ban truthful advertising by utilities promoting use of electric energy solely on the basis of its fears that such advertising might cause waste of energy or cause consumers to believe that energy conservation might not be necessary.

* * *

21. On July 14, 1977, the Commission issued an "Order Denying Petitions for Rehearing" (herein "Order on Rehearing"), a copy of which is attached as Exhibit D to the Petition herein.

22. In the Order on Rehearing the Commission denied Central Hudson's petition for rehearing.

23. While Central Hudson believes the Commission's prohibition of promotional advertising may be set aside purely on legal grounds, a brief description of the factual context in which such prohibition operates is provided to the Court. The purpose of promotional advertising by an electric utility is to more effectively utilize available generating capacity. This can be best done by promoting the consumption of electric energy during off-peak periods.

24. Since an electric utility has a legal obligation to supply electric energy on demand, it must construct (or contract to purchase) enough generating capacity to meet the needs of its customers during the period their demand for electricity is the greatest. Since human activity or demand for electric energy is not constant throughout the day or year, the demand made by customers for available electric generating capacity fluctuates. During the night when human activity diminishes, demand for electric energy declines from the level experienced during the day. During the spring and fall when temperatures are mild, demand for electric energy is lower than during the summer or winter.

25. As a result of this fact, much available electric generating capacity is underutilized during the night and during the spring and fall. If during these periods of lower utilization electric consumption could be stimulated, the carrying costs of the available capacity could be spread over more units of consumption and rates for electricity could be decreased or the need for rate increases could be diminished.

26. It is precisely the opportunity to spread costs over greater units of consumption which the Commission seeks to deny Central Hudson by its ban on promotional advertising.

27. Aside from more efficient utilization of available generating capacity, advertising promoting certain uses of electric energy may ultimately prove to foster energy conservation. But

it is precisely the realization of this potential which the Commission's prohibition on promotional advertising will tend to frustrate.

28. If the Commission wishes to promote conservation of energy, it should attempt to do so directly by means within its jurisdiction. It cannot, however, take the expediency of abridging Central Hudson's freedom of expression to attempt to achieve that goal.

29. Likewise, the fears expressed by the Commission in the Policy Statement and Order on Rehearing that promotion of electric consumption off-peak may somehow confuse people into believing that energy conservation at other times is not necessary or that such promotion of off-peak electric consumption will increase our nation's dependence on foreign oil are not adequate justification for the prohibition of all promotional advertising. The fears of a governmental body of the effect of truthful information on its recipients may not be used as a basis to prohibit dissemination of such information.

30. The Commission's prohibition of promotional advertising by electric utilities represents an overly paternalistic approach to free speech issues and represents a distrust of the ability of the public to make proper decisions based on available information. It is precisely this type of overly paternalistic governmental restriction which the First Amendment seeks to prevent by prohibiting restraints on the exercise of free speech. Accordingly, the Commission's prohibition of promotional advertising must be struck down.

* * *

40. The Commission, by (i) its prohibition of promotional advertising, (ii) its prohibition of using bill inserts on matters of public controversy, and (iii) its policy of disallowing as reasonable costs for ratemaking purposes the costs of advertising which benefit ratepayers on certain public issues such as nuclear power,

energy policy and environmental matters, is violating Central Hudson's constitutional rights and has acted in an arbitrary and capricious manner.

DAVISON W. GRANT
Davison W. Grant

Sworn to before me this
9th day of November, 1977.

DOREEN M. GROSS

. . . . . .

Notary Public

DOREEN M. GROSS
Notary Public, State of New York
No. 30-4606708
Qualified in Nassau County
Commission Expires March 30, 1979

[Affidavit of Service omitted in printing]

* * *

Exhibit 3 Appended to Affidavit in Support of Petition of Central Hudson Gas & Electric Corporation

[CENTRAL HUDSON LETTERHEAD OMITTED IN PRINTING.]

September 10, 1976

Mr. Samuel R. Madison, Secretary
Public Service Commission
Empire State Plaza
Albany, New York 12223

Dear Mr. Madison:

This letter constitutes Central Hudson's response to the Public Service Commission's Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices (issued July 28, 1976).

The Company believes that the Commission should allow utilities to freely advertise—first, because utilities are guaranteed freedom of speech and second, because utilities are responsible corporate citizens and are more dedicated to the public interest because of the nature of their business than is the ordinary corporate citizen.

It is obvious from the Commission's Notice that there is an implicit belief in the Commission that the Commission should get out of the censorship business. Outside of the question of whether the right of free speech should outweigh considerations of exercise of the police power and consequent regulation and close scrutiny of advertising and advertising expense, the issue really becomes a practical one:

> ". . . the desirability of reducing the considerable amount of staff and Commission time now consumed in the detailed scrutiny of advertising, and in hair-splitting determinations where the amount of dollars involved is close to minimal." (Page 9 of the Commission Notice)

Exhibit 3 Appended to Affidavit in Support of Petition of Central Hudson Gas & Electric Corporation

We would urge the Commission to review the latest United States Supreme Court case in the area of commercial speech, *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 48 L Ed 2d 346 (1976). The Court wisely observed at page 363 of that case:

> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them."

We do ask that a strong and overriding emphasis be given to freedom of speech and that utilities be given every opportunity to operate outside of the present restrictive (by Commission admission) control of the Commission.

The Commission Notice is a sophisticated document which strives hard for objectivity. The arguments pro and con on utility advertising (promotional, institutional and political, or whatever categories one wishes to create) are well known and we do not intend to go into great detail in this statement by adding pro arguments or to amplify and buttress the pro arguments which the Commission mentions. There are, however, two areas which we feel should bear special attention. The first of these is that utilities and, indeed commissions, have a low image in the view of the public. The great problems that have beset the utility industry over the last ten years have received extensive media coverage and those with positions opposed to those of the utilities have received extensive coverage of their views. This has had the practical effect of creating a strong countervailing force to the views of the utilities, and in our opinion, this force has transcended being merely countervailing (which is healthy), but has become almost overwhelming. We are in a practical sense at this point in time in real danger of being overwhelmed by a tyranny of opinion from those opposed to the viewpoints of the industry. Accordingly, there is an imperative

need for a free flow of information from both sides, so that consumers can make informed energy judgments.

The second area involves an understanding of what advertising in a promotional sense is supposed to do and has done with respect to American industry. Advertising in any business is always recognized as a legitimate expense—it has a proven track record of improving profitability and with increased profitability there is always a downward pressure on rates. Increased profitability will inevitably lead to an improved credit rating in the financial marketplace and resultant lower capital costs and consequent downward pressure on rates. Thus, both stockholder and ratepayer benefit. We believe that advertising must be viewed as an integral part of the entire corporate operation of the utility and that making distinctions between stockholder and ratepayer are essentially counterproductive.

Again, we urge the Commission to allow utilities to freely advertise.

Respectfully submitted,

Central Hudson Gas & Electric Corporation

By WILLIAM A. KLING
William A. Kling

Verified Answer of the Public Service Commission of the State of New York

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

against

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

for a judgment pursuant to Article 78 of
the Civil Practice Law and Rules.

Respondent, Public Service Commission of the State of New York answering the petition herein:

1. Admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 8, 10, 11 and 12 of said petition.

2. Denies the allegations contained in paragraph 7 of said petition and refers to the Commission's Policy Statement and Order issued February 25, 1977 for the complete and accurate contents thereof.

3. Denies the allegations contained in paragraph 9 of said petition and refers to the petition for rehearing for its complete and accurate contents.

4. Denies the allegations repeated in paragraphs 13, 15 and 19 of said petition which are denied in this Answer.

5. Denies the allegations contained in paragraphs 14, 16, 17, 18, 20 and 21 of said petition.

AS AND FOR A STATEMENT OF THE GROUNDS OF THE ACTION TAKEN BY RESPONDENT PUBLIC SERVICE COMMISSION, SAID RESPONDENT ALLEGES:

6. Petitioner herein seeks to review the Commission actions which relate to (1) restrictions on the use of bill inserts by utility management to disseminate its points of view on controversial matters of public policy; (2) the cost allocation to be made to the company's shareholders for advertising on controversial issues; and (3) a restriction on promotional advertising by electric utilities.

7. The Commission's determinations in the first two items discussed above is a result of decisions in Commission Cases numbered 27036 and 27052. Case 27036 was commenced by Complaint dated May 24, 1976 by Natural Resources Defense Council, *et al.* which complained of a January 1976 bill insert by Consolidated Edison. The bill insert was a reprint of an article discussing the need for the development of nuclear power to meet the nation's energy demand. The complainants requested a ruling from the Commisson seeking redress for the bill insert, prohibiting the company from discussing issues of a political nature in future bill inserts, and the opportunity to submit material for a future bill insert discussing complainants' views concerning nuclear power. A copy of the Complaint and Memorandum of Points and Authorities in Support of Complaint is appended hereto as Exhibit 1. [Exhibit omitted in printing.]

8. After the submission of complainants' Complaint, Consolidated Edison submitted a Memorandum dated June 21, 1976 and a supplement dated July 1, 1976 opposing the relief sought by complaints. In turn, complainants submitted a response to Consolidated Edison's submission. A copy of Consolidated Edison's Complaint and supplement is appended hereto as Exhibit 2. A copy of complainants' response is appended hereto as Exhibit 3. [Exhibits 2 and 3 were omitted in printing.]

9. Based upon its decision in Case 27052, as discussed hereinafter, the Commission by Order dated February 17, 1977 denied the complaint of the Natural Resources Defense Council,

Inc. *et al.*, since that matter had been disposed of within the context of the Commission's decision in Case 27052. A copy of the Commission's Order of February 17, 1977 is appended hereto as Exhibit 4. [Exhibit omitted in printing.]

10. Commission Case No. 27052 was commenced by respondent's Order issued July 28, 1976 issuing a Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices. The Notice discussed the issue of promotional, institutional and informational advertising by utilities. It solicited comments from interested parties by September 13, 1976. A copy of the Commission's July 28, 1976 Notice is appended hereto as Exhibit 5. [Exhibit omitted in printing.]

11. In response to the Commission's Notice, comments were submitted by numerous parties, including petitioner, Central Hudson. A copy of the comments received by the Commission are appended hereto as Exhibit 6. [Exhibit omitted in printing.]

12. After considering the comments of the parties, the Commission on February 25, 1977 issued its Statement of Policy on Advertising and Promotional Practices of Public Utilities. That order reaffirmed a ban on promotional electric advertising first instituted by the Commission on December 5, 1973 and, imposed restrictions on the use of utility bill inserts to promote the view point of management on controversial issues and determined that the cost of utility advertising on matters of public controversy should be borne by the utility shareholders rather than by the ratepayers. A copy of the Commission's Order of December 5, 1973 is appended as Exhibit 1 to the affidavit of Davison W. Grant accompanying the petition herein. A copy of the Commission's Statement and Order of February 25, 1977 are appended to the petition as Exhibits A and B.

Verified Answer of the Public Service Commission of the State of New York

13. Subsequent to the Commission's Order of February 25, 1977, several parties, including petitioner Central Hudson, applied for rehearing of the Commission's Order. Copies of the petitions for rehearing are appended hereto as Exhibit 7, except the Central Hudson petition, which is attached to the petition as Exhibit C. [Exhibit 7 omitted in printing.]

14. By Order issued July 14, 1977, the Commission denied the petitions for rehearing including the petition by petitioner Central Hudson. A copy of the Commission's Order of July 14 is appended to the petition as Exhibit D.

15. Respondent, Public Service Commission's directives in its Cases 27052 and 27036 were made only after full consideration of the positions of all parties to the proceedings. The actions taken by the Commission were in all respects just, reasonable and lawful, and in no respects arbitrary, capricious, or unlawful.

WHEREFORE, respondent demands judgment confirming the Commission's determinations sought to be annulled herein and denying the relief sought by petitioner.

PETER H. SCHIFF

Dated: November 29, 1977

Counsel to the Public Service
Commission of the State of
New York
Empire State Plaza
Albany, New York 12223
(518) 474-2510

[Verification omitted in printing.]

Judgment of the New York Supreme Court, Albany County

At a Special Term, Part I, of the Supreme Court held in and for the County of Albany, at the County Courthouse in the City of Albany, New York on the 9th day of December, 1977.

Index No. 11317-77

Present:

HON. ROGER J. MINER,
Justice.

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

— against —

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules.

The petitioner, having brought this proceeding, by service of a notice of petition and petition dated and verified November 4, 1977 upon the respondent Public Service Commission of the State of New York for a judgment, pursuant to Article 78 of the Civil Practice Law and Rules, annulling an order and policy statement of respondent Public Service Commission prohibiting advertisements which promote the use of electric energy, the use of bill inserts as a means to disseminate petitioner's position on matters of public controversy and establishing a policy of disallowing for ratemaking purposes the costs of political advertising.

NOW, on reading the notice of petition and petition dated and verified November 4, 1977, and the answer of respondent Public Service Commission verified November 29, 1977 and Exhibits 1 through 6 annexed thereto, and the reply dated De-

cember 6, 1977, and after hearing Davison W. Grant, Esq., attorney for petitioner, in support of the petition, and Howard J. Read, Esq., attorney for respondent, in opposition thereto, and due deliberation having been had, and upon reading and filing the decision of this Court dated the 17th day of February, 1978, and on motion of Peter H. Schiff, Esq., attorney for respondent, it is

ADJUDGED that respondent's directive prohibiting the use of bill inserts as a means to disseminate petitioner's position on matters of public controversy is annulled, and it is

FURTHER ADJUDGED that the said petition in all other respects be and the same hereby is dismissed.

Dated: March 9, 1978
Hudson, N. Y.

ENTER:

ROGER J. MINER

J. S. C.

Order of the New York Supreme Court, Appellate Division, Third Judicial Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 19th day of June, 1978.

Present:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,

HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
Associate Justices.

County Clerk's Index No. 11317-77

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner-Respondent,

— against —

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent-Appellant,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules.

The appellant Public Service Commission of the State of New York having appealed from a judgment of the Supreme Court of Albany County, entered on the 14th day of March, 1978, in the office of the clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Howard J. Read, Esq., of counsel for appellant, and by Davison W. Grant, Esq., of counsel for re-

Order of the New York Supreme Court,
Appellate Division, Third Judicial Department

spondent, and, after due deliberation, the Court having rendered a decision on the 27th day of July, 1978, Justices Sweeney and Main dissenting in part, it is hereby

ORDERED that the judgment entered March 14, 1978 be and hereby is modified, on the law, be deleting so much thereof as annulled the PSC's directive; determination confirmed and, as so modified, affirmed, without costs.

ENTER:

/s/ JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: August 2, 1978.
A TRUE COPY:
JOHN J. O'BRIEN
Clerk